Filed 7/29/15 Buttram v. City and County of S.F. CA1/5

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

| | |
|---|---|
| LYNETTE BUTTRAM,<br>Plaintiff and Appellant,<br>v.<br>CITY AND COUNTY OF SAN FRANCISCO,<br>Defendant and Respondent. | A140655<br><br>(San Francisco City and County Super. Ct. No. CGC-13-528734) |

Lynette Buttram appeals from a judgment of dismissal after a demurrer to her first amended complaint (FAC) was sustained without leave to amend. Buttram challenges an amendment to the City and County of San Francisco (City) Charter requiring all City employees hired on or after January 10, 2009, to contribute up to 2 percent of their pretax compensation to fund retiree health care benefits. She contends that the contribution constitutes an income tax and violates both equal protection and a state law prohibiting municipalities from levying or collecting "any tax upon income, or any part thereof, of any person, resident or nonresident." (Rev. & Tax. Code, § 17041.5; hereafter section 17041.5.) We disagree and affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND[1]

The City is a municipal corporation and a charter city existing and organized under the laws of the State of California.[2] In June 2008, City voters passed Proposition B, which amended the City Charter to provide in part that all City employees hired on or after January 10, 2009, shall contribute up to 2 percent of their pretax compensation to fund the Retiree Health Care Trust Fund (RHCTF).[3] Proposition B also requires the City to contribute 1 percent of all such employees' compensation to the RHCTF. Proposition B addressed serious financial concerns relating to the City's $4 billion unfunded liability for retiree health care benefits, and the RHCTF is intended to defray health care costs for eligible retired City employees and their survivors.

Between July 7 and November 23, 2012, Buttram was employed by the City at San Francisco General Hospital as a temporary, as-needed medical assistant.[4] In March 2013, Buttram was rehired again on a temporary, as-needed basis. The City

---

[1] The material facts are derived from allegations of the FAC, the documents referenced therein, and documents we may judicially notice.

[2] "A chartered city under the 'home rule' provisions of article XI, section 5, of the California Constitution has complete powers over municipal affairs and unless limited by the charter, the city council may exercise all powers not in conflict with the California Constitution." (*Miller v. City of Sacramento* (1977) 66 Cal.App.3d 863, 867.)

[3] Proposition B, as codified in the City Charter, provides in relevant part: "There is hereby created the [RHCTF] . . . . [¶] Active officers and employees of the [City] . . . who Commenced Employment on or after January 10, 2009, shall contribute their respective Employer's Normal Cost to the RHCTF[,] . . . computed as a percentage of compensation not to exceed 2% of pre-tax compensation for each officer and employee. . . . [¶] [The City] and Participating Employers shall each contribute 1% of compensation for officers and employees who Commenced Employment on or after January 10, 2009." (S.F. Charter, § A8.432.)

[4] The job announcement for Buttram's position set forth the duties, terms and conditions of employment, salary information, and the following disclosure: "BENEFITS [¶] All employees hired on or after January 10, 2009 will be required (pursuant to San Francisco Charter section A8.432) to contribute 2% of pre-tax compensation to fund retiree healthcare. In addition, most employees are required to make a member contribution towards retirement, typically 7.5% of compensation."

employs approximately 23,000 employees, several thousand of whom are temporary, as-needed employees. The City Charter exempts temporary, as-needed employees from competitive civil service.

Buttram alleges that temporary, as-needed employees are not eligible to participate in any employee benefit plans, including retirement health care, because such employees "are not permitted by the City . . . to exceed 1,040 hours in either a fiscal or rolling calendar year." She further alleges that, even if a temporary employee is able to convert into a permanent, civil service position, former temporary, as-needed employees are not given credit for the contributions made in that role. Thus, she alleges that despite being subject to wage deductions of 2 percent of their gross salary under Proposition B, Buttram and a class of similarly situated City employees will never benefit in any way from the RHCTF. According to Buttram, proposed class members unfairly subsidize other City employees' retirement benefits, even though those other employees' average gross earnings are about four times that of the proposed class.

However, a plaintiff may not avoid demurrer by suppressing judicially noticeable facts, which prove her allegations false. (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 877.) By separate order, we granted the parties' stipulated request for judicial notice. The City Charter and plan documents contradict Buttram's allegation that temporary, as-needed employees are not permitted to work more than 1,040 hours "in either a fiscal or rolling calendar year." Temporary, as-needed employees are prohibited only from "exceed[ing] [1,040 hours] *during any fiscal year*." (S.F. Charter, § 10.104(16), italics added.) City employees become members of its retirement system when they work more than 1,040 hours "during any 12-month period." (S.F. Admin. Code, § 16.42(b)(3).)

The City's retiree health plan also provides that employees with less than five years of service time at retirement are not entitled to any retiree medical benefits coverage. City employees who retire with at least five years of service, but less than 10 years, have access to retiree medical benefits coverage but receive no employer contribution; retirees with at least 10 years of service are eligible for benefits paid

50 percent by the City; retirees with at least 20 years of service, are eligible for benefits paid 100 percent by the City. "Unlike employee pension contributions that are made to individual accounts, [employee] contributions to [the RHCTF] are non-refundable even if an employee separates from the City and does not receive retiree health care from the City."

The FAC asserts causes of action for violation of Labor Code sections 220.2, 221, 222, and 224,[5] violation of section 17041.5 and equal protection, declaratory relief, and money had and received. Buttram alleges: "Although never labeled or called a tax by [the City], and not represented as a tax to the city voters when they voted on Proposition B, the taking by the City of 2% of class members' wages constitutes an illegal special income tax [in violation of section 17041.5]." She also asserts: "[Proposition B] as applied . . . is arbitrary, unreasonable and discriminatory. It rests on no reasonable consideration of difference between those subject to the tax and those not subject to it."

The City filed a demurrer, contending that the employee contribution required by Proposition B is not an income tax subject to section 17041.5. In the alternative, the City

---

[5] "Contributions to vacation allowances, pension or retirement funds, sick leave, and health and welfare benefits on behalf of persons employed by any county, political subdivision, incorporated city or town or other municipal corporations may be made in the same manner and on the same basis as made by private employers. . . ." (Lab. Code, § 220.2.) "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee." (*Id.*, § 221.) "It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either willfully or unlawfully or with intent to defraud an employee, a competitor, or any other person, to withhold from said employee any part of the wage agreed upon." (*Id.*, § 222.) "The provisions of Sections 221, 222 and 223 shall in no way make it unlawful for an employer to withhold or divert any portion of an employee's wages when the employer is required or empowered so to do by state or federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute, or when a deduction to cover health and welfare or pension plan contributions is expressly authorized by a collective bargaining or wage agreement." (*Id.*, § 224.)

also contended, " '[W]ages paid by a charter city to its own employees are a municipal affair not subject to regulation by the state Legislature.' " (Quoting *State Building & Construction Trades Council of Califonia v. City of Chula Vista* (2012) 54 Cal.4th 547, 562, italics omitted.) The City also argued that Proposition B does not "single out the [proposed] class" because the 2 percent contribution applies to all City employees hired on after January 10, 2009.

The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal. The court explained, in relevant part: "Proposition B does not impose an income tax. [The City] is engaging in marketplace conduct, not regulation. (See *Aeroground v. City and County of San Francisco* (N.D.Cal. 2001) 170 F.Supp.2d 950, 957.) [¶] . . . Proposition B provides a rational basis for its implementation, which is to address a shortfall in retire[e] health care liability. Proposition B requires all [City] employees hired after its effective date to make the [2 percent] contribution." Buttram filed a timely notice of appeal.

## II. DISCUSSION

On appeal, Buttram abandons her causes of action for Labor Code violations, as well as a derivative cause of action under the Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.). Instead, she argues that her FAC is sufficient to state causes of action for violation of section 17041.5 and equal protection. Specifically, she maintains that Proposition B is preempted by state law (§ 17041.5) forbidding local governments from imposing income taxes. We hold that Proposition B is not a tax, much less an income tax. Because Proposition B and section 17041.5 do not conflict, we need not reach the question of whether section 17041.5 is an unconstitutional interference with the City's powers as a charter city. Buttram's equal protection argument is also without merit.

### A. *Standard of Review*

"On appeal from an order of dismissal after an order sustaining a demurrer, the standard of review is de novo: we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.] First, we give the

complaint a reasonable interpretation, reading it as a whole and its parts in their context. Next, we treat the demurrer as admitting all material facts properly pleaded. Then we determine whether the complaint states facts sufficient to constitute a cause of action. [Citations.] [¶] We do not, however, assume the truth of contentions, deductions, or conclusions of law." (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439–440.) If the allegations in the complaint conflict with the facts included in exhibits attached to or referenced in the complaint, "we rely on and accept as true the contents of the exhibits. However, in doing so, if the exhibits are ambiguous and can be construed in the manner suggested by plaintiff, then we must accept the construction offered by plaintiff." (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83; accord, *Satten v. Webb* (2002) 99 Cal.App.4th 365, 375.)

We are "not bound by the trial court's construction of the complaint." (*Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 958.) Rather, we independently evaluate the complaint, construing it liberally. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) However, "the plaintiff bears the burden of demonstrating that the trial court erred. [Citation.] . . . [¶] . . . As a consequence, [the plaintiff] bears the burden of overcoming all of the legal grounds on which the trial court sustained the demurrers . . . ." (*Cantu v. Resolution Trust Corp., supra,* 4 Cal.App.4th at pp. 879–880, italics & fns. omitted.)

B. *Preemption*

Buttram asserts that Proposition B is preempted by a state law that forbids local governments from imposing income taxes. (§ 17041.5.) Although local regulations are generally subject to preemption by State law, the California Constitution creates an exception for charter city provisions addressing "municipal affairs." (Cal. Const., art. XI, § 5 [city charter provisions "with respect to municipal affairs shall supersede all laws inconsistent therewith," but "in respect to other matters they shall be subject to general laws"].) Article XI, section 5, subdivision (b) of the California Constitution gives charter cities the power to provide for compensation of their employees. (*City of Downey v. Board of Administration* (1975) 47 Cal.App.3d 621, 629.) Accordingly, California charter cities can provide employee pensions, pursuant to their power over "municipal

affairs." (*Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 345, 351–352; *McLeod v. Board of Pension Commissioners* (1970) 14 Cal.App.3d 23, 29.)

Nonetheless, "[i]f [a reviewing court] is persuaded that the subject of [a] state statute is one of statewide concern and . . . the statute is reasonably related to its resolution, then the conflicting city charter measure ceases to be a 'municipal affair' pro tanto and the Legislature is not prohibited . . . from addressing the statewide dimension by its own tailored enactments." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 17.) Where possible, courts should avoid such a difficult choice "by carefully ensuring that the purported conflict [between local and state laws] is in fact a genuine one, unresolvable short of choosing between one enactment and the other." (*Ibid*.) "First, a court must determine whether there is a genuine conflict between a state statute and a municipal ordinance. [Citations.] Only after concluding there is an actual conflict should a court proceed with the second question; i.e., does the local legislation impact a municipal or statewide concern?" (*Barajas v. City of Anaheim* (1993) 15 Cal.App.4th 1808, 1813.)

The first question is whether section 17041.5 and Proposition B conflict. Section 17041.5 provides: "Notwithstanding any statute, ordinance, regulation, rule or decision to the contrary, *no* city, county, *city and county*, governmental subdivision, district, public and quasi-public corporation, municipal corporation, whether incorporated or not or whether chartered or not, *shall levy or collect or cause to be levied or collected any tax upon the income*, or any part thereof, of any person, resident or nonresident. [¶] This section shall not be construed so as to prohibit the levy or collection of any otherwise authorized license tax upon a business measured by or according to gross receipts." (Italics added.) Buttram claims the employee contribution required under Proposition B is, in effect, an income tax. The City, on the other hand, maintains that Proposition B is not a tax, much less an income tax.

1. *The Market Participation Doctrine*

The parties agree that no authority is directly on point to assist in resolving Buttram's novel argument. However, they both point to the market participation

doctrine, which is typically applied in federal labor law preemption cases. "In general, Congress intends to preempt only state regulation, and not actions a state takes as a market participant. [Citation.] [¶] [S]tate action falls within the market participant exception to preemption when the state entity directly participates in the market by purchasing goods or services. [Citation.] But the line between non-preempted market participation and preempted regulation is not always so clear, and a state's direct participation in the market will not always escape preemption. If a state's direct participation in the market is 'tantamount to regulation,' the market participant doctrine will not exempt the state's action from preemption." (*Johnson v. Rancho Santiago Community College Dist.* (9th Cir. 2010) 623 F.3d 1011, 1022–1023.) "Application of [the market participant] principle invariably turns upon whether the state conduct at issue truly constitutes participation in an open private market or is instead simply a form of governmental regulation." (*Children's Hospital & Medical Center v. Bonta´* (2002) 97 Cal.App.4th 740, 767.) In other words, "when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute regulation subject to preemption." (*Cardinal Towing v. City of Bedford* (5th Cir. 1999) 180 F.3d 686, 691 (*Cardinal Towing*).)

In *Cardinal Towing, supra,* 180 F.3d 686, the city of Bedford, Texas originally had a police practice of rotating its use of tow truck companies for nonconsenual removal of abandoned or disabled vehicles. Bedford later passed an ordinance requiring the solicitation of bids to award a contract to a single towing company. A competing tow truck company sued for a declaration that the ordinance was preempted, under section 14501(c) of title 49 of the United States Code, because it regulated the price, route, or service of a motor carrier with respect to the transportation of property. (*Cardinal Towing,* at pp. 688–689.) Although *Cardinal Towing* is not factually similar to the case before us, both parties urge application of its governing standard.

*Cardinal Towing* distinguishes "between regulation and actions a state takes in a proprietary capacity—that is to say, actions taken to serve the government's own needs

rather than those of society as a whole." (*Cardinal Towing, supra,* 180 F.3d at p. 691.) "[T]he key . . . is to focus on two questions. First, does the challenged action essentially reflect the entity's own interest in its *efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances*? Second, does *the narrow scope of the challenged action* defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out." (*Id.* at p. 693, italics added; accord, *Aeroground v. City and County of San Francisco, supra,* 170 F.Supp.2d at p. 957.)

Buttram argues that Proposition B should be considered a "tax" because it fails the first *Cardinal Towing* test. She asserts, "no private employer in California is authorized to deduct from its employees' wages money needed to meet obligations of the employer to third persons." However, we have already observed that Buttram's premise—that temporary, as-needed employees cannot benefit from Proposition B—conflicts with the Charter and plan documents, which we have judicially noticed.[6] It appears that as needed, temporary employees are in a similar situation to other City employees who retire with less than five years' service time. Because the contributions are not made to individual accounts, no City employee is entitled to a refund of his or her contributions to the RHCTF if they separate from employment without receiving retiree health care. In her reply brief and at oral argument, Buttram suggests that the City has a "deliberate

[6] At oral argument before the trial court, the City admitted that a member of the class, *as Buttram had defined it*, could never obtain a benefit from the 2 percent charge. Buttram's proposed class is limited to those "exempted temporary employees who are not permitted by the City . . . to exceed 1040 hours of work in either a fiscal or rolling calendar year, and who receive no health benefits at all during their employment, and who because of their limited schedules or length of service, or both, or . . . whose length of service does not equal five years when terminated, all of whom are not eligible to participate in the RHCTF."

policy"—in conflict with the Charter—of preventing temporary, as-needed employees from working more than 1,040 hours in any year. Even if true, nothing is atypical, or unconstitutionally discriminatory, about requiring employees to contribute to employee benefits despite the possibility they may never receive them due to limited service. And employers *are* permitted to deduct health or pension plan contributions when authorized by the employee or by a collective bargaining agreement. (Lab. Code, § 224; *Prachasaisoradej v. Ralphs Grocery Co., Inc.* (2007) 42 Cal.4th 217, 226, fn. 3.) The City participates in the marketplace as an employer. The City merely addressed a benefit funding problem in the same way any other employer would—by passing along some of the costs of such benefits to its employees.

We also agree with the City that Proposition B is not a broad, regulatory measure. The disputed employee contribution only applies to City employees, not all City taxpayers or persons doing business in the city. The City is merely requiring that employees contribute to fund employee retirement health care. In contrast to Buttram's cited authority, nothing indicates City voters sought to achieve any broad policy goal with their approval of Proposition B. (Compare with *Chamber of Commerce of United States of America v. Brown* (2008) 554 U.S. 60, 63 [state law prohibited employers receiving state funds from using such funds to " 'assist, promote, or deter union organizing' "] with *Matter of Council of City of New York v. Bloomberg* (2006) 6 N.Y.3d 380, 386–387, 390, 392 [local law forbidding city agency from entering contracts with any firm failing to provide benefit parity to domestic partners was "obviously designed as 'an enactment of social policy' "].) There is no broad policy goal served by Proposition B.

Buttram maintains the second *Cardinal Towing* question is inapplicable. But "[t]he *Cardinal Towing* test . . . offers two *alternative* ways to show that a state action constitutes non-regulatory market participation: (1) a state can affirmatively show that its action is proprietary by showing that the challenged conduct reflects its interest in efficiently procuring goods or services, or (2) it can prove a negative—that the action is not regulatory—by pointing to the narrow scope of the challenged action. [There is] no

reason to require a state to show both that its action is proprietary and that the action is not regulatory." (*Johnson v. Rancho Santiago Cmty. College Dist.*, *supra*, 623 F.3d at p. 1024, italics added & omitted.) Here, application of either *Cardinal Towing* test leads to the same conclusion—the City is acting as a market participant in requiring employees to contribute to the RHCTF. Buttram concedes that, "[i]f the City is acting as a mere proprietor or market participant, the charge cannot be considered a tax." But we would also reach the same conclusion under state law governing the distinction between taxes and fees.

"[Such] cases recognize that 'tax' has no fixed meaning, and that the distinction between taxes and fees is frequently 'blurred,' taking on different meanings in different contexts. [Citations.] In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. [Citations.] Most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges." (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874.) "Taxes are raised for the general revenue of the governmental entity to pay for a variety of public services." (*County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974, 983.) Thus, a tax may be imposed upon a class that may enjoy no direct benefit from its expenditure and is not directly responsible for the condition to be remedied. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 442.)

Buttram appears to argue that the employee contribution required by Proposition B must be a tax, at least with respect to her proposed class, because the proposed class members will necessarily receive no benefit. We have already rejected the argument. In any event, this factor is not dispositive in distinguishing fees and taxes. (*Sinclair Paint Co. v. State Bd. of Equalization*, *supra*, 15 Cal.4th at pp. 875–876.) Proposition B does not raise general revenue. In fact, contributions specifically fund the RHCTF and cannot be used for other purposes. The employee contribution mandated by Proposition B is not a compulsory payment. It is better understood as a component of the consideration

sought from those who choose to accept City employment. The employee contribution mandated by Proposition B is not a "tax."

2. *Income Tax*

Even if we assume for purposes of argument that Proposition B is a tax, we agree with the City that it is not an income tax subject to section 17041.5. Buttram appears to contend that the Proposition B contribution must be an income tax solely because it is measured by wages paid.

In *Weekes v. City of Oakland* (1978) 21 Cal.3d 386, our Supreme Court considered the City of Oakland's adoption of an " 'employee license fee' " ordinance, which imposed a 1 percent fee on the " 'privilege of engaging in or following any business, trade, occupation or profession as an employee.' " (*Id.* at p. 390.) The fee was measured by the employee's " 'gross receipts' " for services performed within the city, regardless of where the employee resided. (*Id.* at pp. 390, 391–392.)

The court agreed with the city that fee was not an income tax, but an "occupation tax" expressly authorized by the final paragraph of section 17041.5. (*Weekes v. City of Oakland, supra,* 21 Cal.3d at p. 391.) The court observed "numerous differences" between the fee at issue and a typical income tax. (*Id.* at p. 392.) "For example, the provision which defines 'gross income' for state income tax purposes (§ 17071 . . . ), includes not only 'compensation for services' and 'gross income derived from business' but 'interest,' 'rents,' 'royalties,' 'annuities,' 'income from discharge of indebtedness,' 'income from an interest in an estate or trust,' and other items and sources of revenue which the Oakland tax does not purport to reach. Moreover, the traditional assessment commonly recognized as an income tax is ordinarily a tax upon net income—that is, gross income reduced by other taxes, business expenses, and costs incurred in the production of the income. The Oakland ordinance, in contrast, expressly includes, as compensation subject to the levy, sums deducted 'before "take home" pay is received' . . . ." (*Id.* at pp. 392–393.)

Similar to the tax imposed in *Weekes v. City of Oakland, supra,* 21 Cal.3d 386, the challenged contribution in this case is based on gross compensation before any

deductions or exemptions are allowed. Furthermore, it resembles an income tax even less than the tax at issue in *Weekes* because it is collected only from those who choose to accept employment with the City on or after January 10, 2009.

The employee contribution mandated by Proposition B is not an income tax.[7] The trial court did not err in concluding that Buttram had failed to allege facts sufficient to state a cause of action for violation of section 17041.5.

C. *Equal Protection*

Finally, Buttram argues that Proposition B violates equal protection because "only some employees get any benefit from the 'contribution.' " Buttram makes clear that she is not arguing that temporary, as-needed employees are singled out as the only employees required to pay the 2 percent charge. She concedes that all City employees hired on or after January 10, 2009, pay the 2 percent charge. Buttram instead attempts to state an "as-applied" challenge. She argues "no member of the class [she] seeks to represent will ever obtain any benefits from the RHCTF as a result of their work, because [the City] has a deliberate policy of preventing those employees from meeting the requirements of membership . . . ." The problem is that Proposition B neither makes any actual classification of temporary, as-needed employees, nor does Buttram allege an application of the law with intent to discriminate against them.

"An argument relating to the impact of a classification does not alone show its purpose. [Citation.] Equal protection analysis turns on the intended consequences of government classifications." (*Hernandez v. New York* (1991) 500 U.S. 352, 362.) "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. [Citations.] The calculus of effects, the

---

[7] Buttram, in her reply brief, cites *Howard v. Commissioners* (1953) 344 U.S. 624, 624–625, 629 [city ordinance, similar to that of *Weekes v. City of Oakland,* constituted an income tax under federal law as applied to employees working on federally owned land].) The federal law construed by the *Howard* court has no application here.

manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. [Citations.] In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification." (*Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256, 271–272.)

" '[A] classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.' " (*Armour v. City of Indianapolis, Ind.* (2012) ___ U.S. ___ [132 S.Ct. 2073, 2080].) "Further, because the classification is presumed constitutional, the ' "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' " (*Id.* at ___ U.S. at pp. ___ [132 S.Ct. at pp. 2080–2081].) " '[I]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' " (*Allegheny Pittsburgh Coal v. Webster County* (1989) 488 U.S. 336, 344.) "[U]nder the rational relationship standard, a court may not strike down a classification simply because the classification may be imperfect [citation] or because it may be 'to some extent both underinclusive and overinclusive.' " (*Warden v. State Bar* (1999) 21 Cal.4th 628, 649, fn. 13.)

Buttram has not met her burden to show that the classification *actually made* by Proposition B—between employees hired before January 10, 2009, and employees hired on after that date—bears no rational relationship to any conceivable legitimate state purpose. Buttram does not dispute that the City had a rational basis for imposing the employee contribution requirement—resolving the $4 billion retiree health care shortfall. Reliance and expectation interests of City employees hired before January 10, 2009, were legitimate governmental concerns rationally related to the distinction made by Proposition B. "[C]lassifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws." (*Nordlinger v. Hahn* (1992) 505 U.S. 1, 13, fn. omitted.)

To the extent Buttram challenges the imposition of a larger contribution on City employees than on all City taxpayers, that classification also survives rational basis review. She suggests it is irrational for the City to impose the Proposition B contribution on proposed class members, and not all City taxpayers, when both groups are similarly situated because it is "certain [temporary, as-needed employees] can never qualify" for retiree health care. As we have previously observed, the City Charter and Administrative Code do not forestall temporary, as-needed employees from eventually establishing eligibility for retiree health care benefits. (S.F. Admin. Code, § 16.42(b)(3); S.F. Charter, § 10.104(16).) And it appears that City taxpayers will still be responsible, to some extent, for City employee retiree health care costs. It is not arbitrary or irrational to distinguish between City employees, who may someday become eligible for such benefits and City taxpayers who will not directly benefit. All City employees have an interest in the solvency of the retiree health care system.

Buttram does not suggest how to limit mandatory contributions to those newly-hired City employees who will *absolutely* obtain retiree health benefits. At the outset of employment, the task would be impossible. City voters made a reasonable decision that the cost of providing retirement health care for City employees should be borne, not *solely* by the public, but also by those persons who would most likely stand to benefit. The fact that the calculus was not perfect and that there may be some City employees who never receive the benefits funded by Proposition B, is not legally material to the equal protection analysis.

The trial court did not err in concluding Buttram could not state an equal protection cause of action.

## III. DISPOSITION

The judgment is affirmed. The City is entitled to its costs on appeal.

_____
BRUINIERS, J.

WE CONCUR:

_____
JONES, P. J.

_____
NEEDHAM, J.